Datuk Seri S Samy Vellu v S Nadarajah

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–71 OF 1996
ABDUL WAHAB J
22 SEPTEMBER 2000

Constitutional Law *— Constitution — Pre-Merdeka law — Whether inconsistent with constitution — Effect of inconsistencies — Modification of pre-Merdeka law to conform with constitution — Federal Constitution art 162(6)*

Constitutional Law *— Legislation — Pre-Merdeka law — Inconsistency with constitution, whether pre-Merdeka law can be declared null and void — Federal Constitution arts 4 & 162(6)*

Criminal Procedure *— Complaint — Private prosecution of — Investigatory or preliminary actions of magistrate, whether amount to insitution of prosecution — Meaning of 'proceedings for an offence' — Whether private prosecution contrary to art 145(3) of Federal Constitution — Criminal Procedure Code ss 133–136 & 380*

Criminal Procedure *— Prosecution — Right to conduct prosecution — Whether exclusive power of Attorney General — Whether private persons can institute or conduct prosecution — Federal Constitution art 145(3) — Criminal Procedure Code s 380(ii)(c)*

The respondent made a complaint on oath before the magistrate against the applicant. The magistrate ordered that summons be issued against the applicant whereby he was charged for an offence under s 352 of the Penal Code. The applicant applied for questions of constitutional law to be referred to the High Court, namely: (i) whether ss 133–136 and 380 of the Criminal Procedure Code ('the CPC') are contrary to art 145(3) of the Federal Constitution ('the Constitution') because the power to institute proceedings for an offence and to prosecute for an offence in these sections were conferred upon a person other than the Attorney General; (ii) whether ss 133–136 and 380 of the CPC, being pre-Merdeka law, are inconsistent with art 145(3) of the Constitution; (iii) whether ss 133–136 of the CPC, in placing an executive function upon the magistrate, breach arts 39 and 121(1) of the Constitution which assigned executive powers to the executive and judicial powers to the judiciary respectively; and (iv) whether ss 133–136 which contain provisions to commence proceedings without investigation and/or without the attendance of the accused to be heard before such commencement, are invalid and void as being contrary to arts 5 and 8 of the Constitution.

Held:

(1) The mere fact that the CPC is a pre-Merdeka law does not mean that it is necessarily inconsistent with the Constitution. The court may apply the pre-Merdeka law with such modifications, which

A term includes amendment, adaptation and repeal as may be necessary to bring that provision of the pre-Merdeka law into accord with the Constitution (see pp 705F–G, 710F–G).

(2) It is apparent from ss 128 and 133–136 that the actions of the magistrate at this stage are investigatory or preliminary in nature. The language of art 145(3) on the other hand refers to any proceedings for an offence other than before a Syariah Court, a native court or a court martial. It is proper to conclude that the Constitution intends that 'proceedings for an offence' to refer to a proceeding for an offence as instituted when a charge is framed, read and a plea is taken in a court rather than before a magistrate not sitting in court. Clearly art 145(3) has no application to ss 133–136 of the CPC (see pp 708F, H–I).

(3) Article 145(3) does not reserve to the Attorney General exclusively the power to institute or to conduct proceedings for offences. It follows that provisions that allow other persons to institute or conduct such proceedings are not necessarily inconsistent with art 145(3). Article 145(3) bestows upon the Attorney General an overriding authority and he could stop any private prosecution by entering a nolle prosequi, or to take it over at any time. Section 380(ii)(c) is therefore not repugnant to art 145(3) (see p 711C–D).

(4) It is immediately apparent if the argument is that in private prosecutions the magistrate is exercising a power to institute criminal proceedings, it is wholly misconceived. In a private prosecution, it is the complainant who institutes the proceedings. The actions of the magistrate under s 133–136 are purely quasi-judicial procedural steps. In any event, it would appear that arts 39 and 121 neither bars persons, as distinct from courts, other than the executive from exercising executives functions, nor is judicial authority vested and reserved in the courts to the exclusion of all else. Clearly executive powers may be conferred by law upon other persons not in the executive branch of government. In other words, the Constitution does not envisage that the executive has sole or exclusive claim upon executive powers (see p 711A–C, E).

(5) Since the CPC is a pre-Merdeka law, art 4 does not come into operation to strike down a law as being void upon the grounds of being inconsistent with the Constitution. The applicable provision is art 162(6) which requires the court to make modifications to the law to make it accord with the Constitution. Thus ss 133–136 cannot be declared to be null and void (see pp 712I–713A).

(6) The short answer under art 5(1) is that the procedure set out in ss 133–136 is contained in law. Thus the issue of process upon the applicant is in accordance with law. The equally short answer under art 8 is that all complaints of a non-seizable offence being

committed by a person is proceeded with under ss 133–136. Thus all persons alleged to have committed a non-seizable offence are equal and are equally protected (see p 713F–G).

(7) In all of the circumstances, there was insufficient material before the magistrate for him to issue the summons. He ought to have acted under s 134 and ordered a police officer to investigate and to report back to him before making a decision whether or not to issue a summons. Considering that the issue of a summons or warrant results in the restriction of the liberty of a person in that he must appear at the time and place stated, these are not powers to be lightly exercised. He ought not have acted prematurely. It was wrong for the magistrate to have framed the charge and to have issued the summons. Therefore, the court would exercise the powers under s 35 of the Courts of Judicature Act 1964 and order the summons to be quashed (see pp 717I–718B).

[Bahasa Malaysia summary

Responden telah membuat aduan bersumpah di hadapan majistret terhadap pemohon. Majistret telah memerintahkan agar saman dikeluarkan terhadap pemohon di mana beliau dituduh melakukan kesalahan di bawah s 352 Kanun Keseksaan. Pemohon telah memohon agar soalan-soalan berhubung dengan undang-undang perlembagaan di rujuk kepada Mahkamah Tinggi, terutamanya: (i) sama ada ss 133–136 dan 380 Kanun Acara Jenayah ('KAJ') adalah bertentangan dengan perkara 145(3) Perlembagaan Persekutuan ('Perlembagaan') kerana kuasa untuk memulakan prosiding untuk suatu kesalahan dan untuk membuat dakwaan terhadap suatu kesalahan dalam seksyen-seksyen tersebut telah diberi kepada seseorang selain daripada Peguam Negara; (ii) sama ada ss 133–136 dan 380 KAJ, yang merupakan undang-undang pra-Merdeka, adalah tidak konsisten dengan perkara 145(3) Perlembagaan; (iii) sama ada ss 133–136 KAJ, di dalam meletakkan fungsi eksekutif ke atas majistret, melanggar perkara 39 dan perkara 121(1) Perlembagaan yang memperuntukkan kuasa-kuasa eksekutif kepada badan-badan kuasa eksekutif dan kehakiman masing-masing; dan (iv) sama ada ss 133–136 yang mengandungi peruntukan-peruntukan untuk memulakan prosiding tanpa siasatan dan/atau tanpa kehadiran tertuduh didengari sebelum permulaan prosiding sedemikian, adalah tidak sah dan batal kerana bertentangan dengan perkara 5 dan perkara 8 Perlembagaan.

Diputuskan:

(1) Hanya dengan fakta bahawa KAJ adalah undang-undang pra-Merdeka tidak bermaksud bahawa ia semestinya tidak konsisten dengan Perlembagaan. Mahkamah boleh menggunakan undang-undang pra-Merdeka dengan beberapa pengubahsuaian, iaitu

yang melibatkan pindaan, pengadaptasian dan pemansuhan di mana perlu untuk menyebabkan peruntukan undang-undang pra-Merdeka tersebut selaras dengan Perlembagaan (lihat ms 705G, 710F–G).

(2) Adalah nyata daripada ss 128 dan 133–136 bahawa tindakan majistret di peringkat ini adalah bersifat siasatan atau permulaan. Bahasa dalam perkara 145(3) sebaliknya merujuk kepada mana-mana prosiding untuk kesalahan selain daripada yang dihadapkan ke Mahkamah Syariah, mahkamah anak negeri atau mahkamah tentera. Adalah wajar untuk membuat kesimpulan bahawa Perlembagaan berhasrat agar 'prosiding untuk satu kesalahan' merujuk lebih kepada satu prosiding untuk satu kesalahan sebagai mana yang dimulakan apabila satu tuduhan dibuat, dibaca dan satu pli diambil di mahkamah daripada di hadapan seorang majistret yang tidak bersidang di mahkamah. Adalah jelas perkara 145(3) tidak terpakai setakat ss 133–136 KAJ berkenaan (lihat ms 708F, H–I).

(3) Perkara 145(3) tidak menguntukkan kepada Peguam Negara kuasa-kuasa eksklusif untuk memulakan atau mengendalikan prosiding untuk kesalahan-kesalahan. Ini bererti bahawa peruntukan-peruntukan yang membenarkan orang lain untuk memula atau mengendalikan prosiding sedemikian tidak semestinya tidak konsisten dengan perkara 145(3). Perkara 145(3) mengurniakan ke atas Peguam Negara kuasa utama dan beliau boleh menghentikan apa-apa prosiding persendirian dengan memasuki satu nolle prosequi, atau mengambilalih (mana-mana prosiding) pada bila-bila masa. Seksyen 380(ii)(c) oleh itu tidak bertentangan dengan perkara 145(3) (lihat ms 711C–D).

(4) Adalah nyata serta-merta hujah yang mengatakan bahawa dalam prosiding persendirian seorang majistret menggunakan kuasa untuk memulakan prosiding jenayah adalah sama sekali disalah tanggap. Di dalam satu prosiding persendirian, pengadu adalah orang yang memulakan prosiding tersebut. Tindakan-tindakan majistret di bawah ss 133–136 adalah semata-mata langkah-langkah prosedur yang kuasi-kehakiman. Dalam apa keadaan, ia akan kelihatan bahawa perkara-perkara 39 dan 121 tidak menghalang sesiapa, berbeza dengan mahkamah-mahkamah, selain daripada eksekutif daripada menggunakan fungsi-fungsi eksekutif, mahupun kuasa kehakiman diberi dan diuntukkan di dalam mahkamah-mahkamah dengan tidak memasukkan sesiapa yang lain. Adalah jelas kuasa eksekutif boleh diberikan oleh undang-undang ke atas orang lain yang bukan di dalan cawangan eksekutif kerajaan. Dalam erti kata lain, Perlembagaan tidak membayangkan bahawa eksekutif memdapat hak sepenuh atau eksklusif ke atas kuasa eksekutif (lihat ms 711A–C, E).

(5) Memandangkan KAJ adalah undang-undang pra-Merdeka, perkara 4 tidak berfungsi untuk menggugurkan suatu undang-

undang sebagai batal atas alasan ia tidak konsisten dengan Perlembagaan. Peruntukan yang terpakai adalah perkara 162(6) yang menghendaki mahkamah membuat mengubahsuaian kepada undang-undang tersebut agar ia selaras dengan Perlembagaan. Oleh itu, ss 133–136 tidak boleh diisytiharkan batal dan tak sah (lihat ms 712I–713A).

(6) Jawapan pendek di bawah perkara 5(1) adalah bahawa prosedur yang dinyatakan dalam ss 133–136 terkandung dalam undang-undang. Oleh itu isu mengenai proses ke atas pemohon adalah menurut undang-undang. Jawapan pendek yang sama di bawah perkara 8 adalah bahawa semua aduan mengenai kesalahan tak boleh tangkap yang dilakukan oleh seseorang dimulakan di bawah ss 133–136. Oleh itu, sesiapa yang didakwa melakukan kesalahan tak boleh tangkap adalah sama dan dilindungi secara saksama (lihat ms 713F–G).

(7) Dalam semua keadaan tersebut, terdapat perkara yang tidak mencukupi di hadapan majistret untuk beliau mengeluarkan saman. Beliau sepatutnya bertindak di bawah s 134 dan memerintahkan seorang pegawai polis untuk menyiasat dan melaporkan balik kepada beliau sebelum membuat satu keputusan sama ada atau tidak untuk mengeluarkan saman. Dengan mempertimbangkan bahawa pengeluaran saman atau waran akan mengakibatkan kebebasan seseorang terbatas di mana beliau mesti hadir pada masa dan di tempat yang dinyatakan, ia bukan kuasa-kuasa yang boleh digunakan sewenang-wenangnya. Beliau tidak sepatutnya bertindak pramasa. Adalah satu kekhilafan majistret untuk membuat satu pertuduhan dan mengeluarkan saman. Oleh demikian, mahkamah akan menggunakan kuasa-kuasa di bawah ss 35 Akta Kehakiman Mahkamah 1964 dan memerintahkan saman tersebut dibatalkan (lihat ms 717I–718B).]

Notes

For a case on pre-Merdeka law, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1410.

For cases on private prosecution of complaint, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1059–1066.

For a case on the right to conduct prosecution, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) para 2277.

Cases referred to

Assa Singh v Menteri Besar, Johore [1969] 2 MLJ 30 (refd)
Kyohei Hosoi v PP [1998] 1 CLJ 1063 (refd)
Long bin Samat & Ors v PP [1974] 2 MLJ 152 (refd)
PP v Bata (M) Bhd [2000] 3 CLJ 433 (refd)
PP v Dato Yap Peng [1987] 2 MLJ 311 (refd)

A *PP v Jamil bin Jilap* [2000] 5 MLJ 311 (refd)
PP v Lee Ming & Anor [1998] 4 MLJ 113 (refd)
PP v Leonard [1960] MLJ 13 (refd)
PP v Manager, MBf Building Services Sdn Bhd [1998] 1 MLJ 690 (refd)
B *Quek Gin Hong v PP* [1998] 4 MLJ 161 (refd)
Rajendran a/l Gurusamy v PP [2000] 4 MLJ 638 (refd)
Rasiah Munusamy, Re [1983] 2 MLJ 294 (refd)
Repco Holdings Bhd v PP [1997] 3 MLJ 681 (refd)
Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah [1998] 3 MLJ 289 (refd)
C *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 30, 35
D Criminal Procedure Code ss 2, 108(i), (ii), 128, (c), 129, 133, 134, 135, 136, 137, 173, 380, (ii)(c), 418A
Federal Constitution arts 4, 5, (1), 39, 121, (1), 145(3), 162, (6), (7)
Penal Code ss 351, 352
Rules of the Federal Court r 31
E Securities Commission Act 1993 s 39
Securities Industry Act 1983 s 126

Cyrus V Dass (*S Nantha Balan* with him) (*Shook Lin & Bok*) for the applicant.
Manjeet Singh Dillon (*Manjeet Singh Dillon*) for the respondent.
F *Vong Poh Fah* (Deputy Public Prosecutor) for the Attorney General's Chambers.
Mohd Ariff Yusof as amicus curiae.

Abdul Wahab J:

G *Introduction and background*

According to the notes of proceedings, the respondent/complainant, S Nadarajah ('the respondent'), made a complaint on oath before the magistrate on 1 July 1996 as follows:

H Pada 10 Mei 1996 sebagai pemegang saham Maika Holding di Mahkota Ballroom, Hotel Istana Kuala Lumpur, sewaktu menghadiri Mesyuarat Agung Maika, dalam proses perdebatan akaun, saya telah membangkitkan isu berkaitan prosiding mengenai akaun terhadap pengerusi syarikat bernama Dr K Ampaikaipalan. Tiba-tiba, seorang lelaki, Dato' S Samy Vellu telah mencabar saya dan memarahi saya. Saya telah membangkitkan 'point of
I order' meminta pengerusi meminta Dato' Samy berkelakuan baik. Beliau telah cuba menyerang saya tetapi bila melihat kakitangan akhbar berada di situ beliau menghentikan tindakan. Dalam proses itu, beliau telah menolak seorang jurugambar dan memukul seorang krew TV3 dengan suatu salinan

laporan tahunan tersebut. Semasa meninggalkan dewan tersebut jam lebih kurang 10.50 pagi, Dato' Samy Vellu keluar dan menerpa saya dan cuba memukul saya tetapi telah dihalang oleh beberapa orang. Saya berada dalam keadaan terperanjat dan ketakutan. Inilah pengaduan saya.

(Satu salinan pengaduan bersumpah disertakan).

(Pengaduan dibaca semula dan diakui).

Tandatangan pengadu Tandatangan majistret

Having taken down the name and address of the person to be summoned, the magistrate recorded as follows:

Keputusan

Mahkamah berpuashati terhadap pengaduan. Keluarkan saman di bawah s 352 terhadap Dato' S Samy Vellu.

Pertuduhan

Bahawa kamu pada 10 Mei 1996 jam lebih kurang 10.50 pagi di luar Mahkota Ballroom, Hotel Istana dalam Wilayah Persekutuan Kuala Lumpur telah menyerang seorang S Nadarajah dengan niat untuk memukul beliau tanpa sebarang provokasi daripada S Nadarajah dan dengan itu kamu telah melakukan satu kesalahan di bawah s 352 Kanun Keseksaan dan boleh dihukum di bawah Seksyen yang sama.

Alamat OKS
Dato' Seri S Samy Vellu
Menteri Kerja Raya
Kementerian Kerja Raya Kuala Lumpur

On 26 July 1996, the respondent and his counsels Karpal Singh, M Manoharan and Gobind Singh; CV Das with C Dhanabalan for the applicant Datuk Seri S Samy Vellu, and DPP KK Wong for the Attorney General, appeared at the trial.

Attendance of the Public Prosecutor

Karpal Singh objected to the attendance of the DPP, submitting that the Public Prosecutor can appear only at the appeal stage but not at the trial of a private prosecution. He said the Public Prosecutor, having given scant attention to the matter earlier had suddenly appeared that morning before the magistrate. He submitted that the DPP did not have the right to attend and suggested that the DPP attend as an observer. He wanted to know if the DPP would attend the entire trial. The magistrate ordered:

Mahkamah: Permohonan PP untuk mencelah dan hadir memberi hujah dibenarkan.

It is regrettable that such submission be made before the magistrate by counsel of much seniority, without reference by counsel, as it appears from the notes, to art 145(3) of the Federal Constitution ('the Constitution'). By such course, counsel failed in his duty as an advocate to assist the court to direct its mind properly to the relevant authority. While our legal system appears to be, and is often described as adversarial in nature, advocates themselves must not lose sight of the fact that, in order that justice be done

according to the law, they must assist the court correctly as to the law. It is not a contest where the object is that the fighter who betters his opponent wins. The object of a trial is to determine the truth and to apply the law correctly to the truth. Only by so acting could advocates be better able to assist the administration of justice to do justice according to law. For that very reason advocates have also been described as officers of the court. The public interest is best served not by who wins the battle of wits, but by whether justice is done according to law.

The applicant had applied for questions of constitutional law to be referred to the High Court. Although the applicant had relied upon r 31 of the Rules of the Federal Court, the correct provision, as pointed out by the learned DPP, should be s 30 of the Courts of Judicature Act 1964. It is not necessary to re-ventilate the arguments since the magistrate ordered the questions under the notice of motion dated 22 July 1996 to be referred to the High Court.

The questions referred to the High Court on 1 August 1996 are as follows:

(i) Seksyen-Seksyen 133 hingga 136 Kanun Prosedur Jenayah (FMS Cap 6) yang mengandungi peruntukan untuk pendakwaan kesalahan-kesalahan oleh individu adalah tak sah dan terbatal kerana ianya adalah ultra vires terhadap perkara 145(3) Perlembagaan Persekutuan, yang memberi kuasa untuk memulakan prosiding-prosiding berhubung dengan satu kesalahan kepada Peguam Negara Persekutuan melainkan prosiding-prosiding di hadapan sesebuah Mahkamah Syariah, Mahkamah Asli [sic] atau Mahkamah Tentera;

(ii) Seksyen 380(ii)(c) Kanun Prosedur Jenayah (FMS Cap 6) yang juga memperuntukkan untuk pendakwaan kesalahan jenayah oleh seorang individu adalah tak sah dan terbatal kerana ianya adalah ultra vires terhadap perkara 145(3) Perlembagaan Persekutuan;

(iii) Selanjutnya dan/atau sebagai alternatif, ss 133 hingga 136 dan s 380(ii)(c) Kanun Prosedur Jenayah (FMS Cap 6) adalah undang-undang pra-Merdeka dan dengan itu adalah tidak konsisten dengan perkara 145(3) Perlembagaan Persekutuan dan tidak terpakai secara sendirinya, dan bahawa melalui perkara 162(6) Perlembagaan Persekutuan adalah diwajibkan bahawa perkara 145(3) tersebut diterapkan ke dalam peruntukan-peruntukan Kanun Prosedur Jenayah tersebut supaya pendakwaan persendirian terhadap satu kesalahan jenayah tidak boleh dimulakan tanpa kelulusan Peguam Negara Persekutuan.

(iv) Seksyen-seksyen 133 hingga 136 Kanun Prosedur Jenayah (FMS Cap 6) yang memberi seseorang pegawai kehakiman fungsi eksekutif dan/atau bukan kehakiman untuk memulakan satu pendakwaan jenayah, adalah tak sah dan terbatal kerana ianya adalah ultra vires terhadap perkara 39 Perlembagaan Persekutuan yang meletakkan hak fungsi eksekutif Persekutuan pada Yang di-Pertuan Agong yang bertindak menerusi orang yang dilantik olehnya, dan perkara 121(1) Perlembagaan Persekutuan yang mengandungi peruntukan untuk perlaksanaan kuasa kehakiman Persekutuan oleh Mahkamah Tinggi dan mahkamah-mahkamah yang di bawahnya yang dibentuk oleh undang-undang persekutuan;

(v) Seksyen-seksyen 133 dan 136 Kanun Prosedur Jenayah (Cap 6) yang mengandungi peruntukan untuk permulaan prosiding-prosiding jenayah tanpa penyiasatan dan/atau tanpa defendan yang diniatkan didengar terlebih dahulu adalah tak sah dan terbatal kerana ianya melanggar proses undang-undang yang dijaminkan oleh perkara 5 dan 8 Perlembagaan Persekutuan.

Interpretation of Pre and Post-Merdeka Laws

Article 4 of the Constitution provides in respect of post-Merdeka laws, as follows:

Supreme law of the Federation

(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

In respect of existing or pre-Merdeka laws, the provision is somewhat different. Article 162 of the Constitution requires the court to amend, adapt or repeal as is necessary to give such law a reading that brings it into accord with the Constitution.

PART XIII

TEMPORARY AND TRANSITIONAL PROVISIONS

Existing laws

(1) Subject to the following provisions of this article and art 163, the existing laws shall, until repealed by the authority having power to do so under this Constitution, continue in force on and after Merdeka Day, with such modifications as may be made therein under this article and subject to any amendments made by Federal or State law.

(2) Where any State law amends or repeals an existing law made by the Legislature of a State, nothing in art 75 shall invalidate the amendment or repeal by reason only that the existing law relating to a matter with regard to which Parliament as well as the Legislature of a State has power to make laws, is Federal law as defined by art 160.

(3) References in any existing law to the Federation established by the Federation of Malaya Agreement, 1948, and its territories, and to any officer holding office under that Federation or to any authority or body constituted in or for that Federation (including any references falling to be construed as such references by virtue of cl 135 of the said Agreement) shall be construed, in relation to any time on and after Merdeka Day, as references to the Federation (that it to say, the Federation established under the Federation of Malaya Agreement, 1957) and its territories and to the corresponding officer, authority or body respectively; and the Yang di-Pertuan Agong may, by order, declare what officer, authority or body is to be taken for the purposes of this clause to correspond to any officer, authority or body referred to in any existing law.

(4) (Repealed).

(5) Any order made under cl (4) may be amended or repealed by the authority having power to make laws with respect to the matter to which the order relates.

A (6) Any court or tribunal applying the provisions of any existing law that has not been modified on or after Merdeka Day under this article or otherwise, may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.

(7) In this article 'modification' includes amendment, adaptation and repeal.

B The Constitution therefore intends that while existing or pre-Merdeka laws may be applied with modifications, as defined by art 162(7), as may be necessary to bring it into accord with the provisions of the Constitution; while in the case of post-Merdeka laws, the approach is less liberal in that such law would, to the extent of the inconsistency, be void.

C *Article 145(3) and ss 128, 133–136 and 380 of the Criminal Procedure Code ('the CPC')*

The third question

D Before proceeding in more detail upon the first three questions referred to this court, I find it necessary to refer first to the third question. I have underlined the words to which attention should be drawn:

(iii) Selanjutnya dan/atau sebagai alternatif ss 133 hingga 136, dan s 380(ii)(c) Kanun Prosedur Jenayah (FMS Cap 6) adalah undang-
E undang pra-Merdeka, dan dengan itu adalah tidak konsisten dengan perkara 145(3) Perlembagaan Persekutuan dan tidak terpakai secara sendirinya, dan bahawa melalui perkara 162(6) Perlembagaan Persekutuan adalah diwajibkan bahawa perkara 145(3) tersebut diterapkan ke dalam peruntukan-peruntukan Kanun Prosedur Jenayah tersebut supaya pendakwaan persendirian terhadap satu kesalahan
F jenayah tidak boleh dimulakan tanpa kelulusan Peguam Negara Persekutuan.

Having correctly described the Criminal Procedure Code as a pre-Merdeka law, the question above leaped to the assertion, as underlined above, that as a result of or because ('dengan itu') of the fact it is a pre-Merdeka law, it is inconsistent with art 145(3) and cannot be applied. The mere fact it is a pre-
G Merdeka law does not mean that it is necessarily inconsistent with the Constitution. Since it is clear the question has been incorrectly framed and it should not have been referred to this court, it therefore requires no answer by this court. That leaves questions 1 and 2 to be answered in relation to art 145(3).

H *The first question*

Article 145(3) provides:

The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence other than
I proceedings before a Syariah Court, a Native Court or a Court-Martial.

Questions 1 and 2 would suggest that ss 133–136 and s 380 of the CPC are contrary to art 145(3) because the power to institute proceedings for an

offence and to prosecute for an offence in these sections are conferred upon a person other than the Attorney General. A

Sections 133–136 of the CPC are as follows:

133 Examination of complainant

(i) When a magistrate takes cognisance of an offence on complaint, the magistrate shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant and also by the magistrate. B

(ii) This section shall not apply to a complaint of an offence when a summons is applied for in a summons case made by a police officer or by a public servant acting in his official capacity.

C

134 Postponement of issue of process

If the magistrate sees reason to doubt the truth of a complaint of an offence of which he is authorised to take cognisance he may, when the complainant has been examined, record his reasons for doubting the truth of the complaint and may then postpone the issue of process for compelling the attendance of the person complained against and either inquire into the case himself or direct some police officer to make inquiries for the purpose of ascertaining the truth or falsehood of the complaint and report to him the result of such inquiries. D

135 Dismissal of complaint

(i) The magistrate before whom a complaint is made may dismiss the complaint if after examining the complainant and recording his examination and considering the result of the inquiry, if any, made under the last preceding section, there is in his judgment no sufficient ground for proceeding. E

(ii) The magistrate if he dismisses the complaint, shall record his reasons for so doing.

F

136 Issue of process

(i) If in the opinion of a magistrate taking cognisance of an offence, there is sufficient ground for proceeding and the case appears to be one in which according to the fourth column of the First Schedule a summons should be issued in the first instance, he shall issue a summons for the attendance of the accused.

(ii) If the case appears to be one in which according to that column a warrant should issue in the first instance, he may issue a warrant or if he thinks fit, a summons for causing the accused to be brought or to appear at a certain time before himself or some other magistrate having jurisdiction. G

(iii) Nothing in this section shall be deemed to affect the provisions of s 47.

H

PP v Leonard [1960] MLJ 13 (CA) is instructive as to the process involved in that a report to the police is information, whilst a complaint is an allegation made to a magistrate, of an alleged offence with a view to his taking action under the CPC. A complaint is defined in s 2 of the CPC:

I

'complaint' means that allegations made orally or in writing to a magistrate with a view to his taking action under this Code that some person whether known or unknown has committed or is guilty of an offence; ... .

Thomson CJ went on to observe that a complaint is not of the facts that constitute an offence, but is simply an allegation that an offence has been committed by some person. Upon an allegation that an offence has been committed by some person, the magistrate may take cognizance of the offence. Cognizance is nothing more than taking an initial decision, upon an allegation that some person has committed an offence, that the allegation ought to be looked into. It is to sift out frivolous, vexatious or petty complaints, or allegations that by their very nature or circumstances are incapable of being proved. Only when cognisance is taken of the complaint that s 133 comes into operation (at p 14):

> Then s 133 provides that when a magistrate takes cognisance of an offence on complaint, he shall examine the complainant upon oath, but it is expressly stated that this section is not to apply to a complaint of an offence where a summons is applied for by a police officer, and the following ss 134 and 135 clearly only apply where the complainant is examined on oath under s 133 and therefore cannot apply where the summons is applied for by a police officer. Section 136 provides that if in the opinion of the magistrate there is sufficient ground for proceeding, then in a summons case he should issue a summons for the attendance of the accused. When the accused appears, s 173 provides for his being charged and tried.

The learned Chief Justice then went on to explain:

> In connection with the commencement of criminal proceedings in a magistrate's court there may be 3 things. There may be an application for a summons. ... Then there may be information, and there may be a complaint .... (p 14)
>
> ... Having taken cognisance of it he was bound to proceed to issue a summons if in his opinion there was sufficient ground for proceeding. (p 15)

Clearly then *PP v Leonard* was referring to how it may happen that criminal proceedings are commenced rather than defining per se when or at what point in time a criminal proceeding is said to have been commenced. In that case information had been reported to the police who then referred the matter to the magistrate. *Re Rasiah Munusamy* [1983] 2 MLJ 294 dealt with the procedure in greater detail (at pp 294–295):

> Now, with the exception of complaints of an offence where a summons is applied for by a police officer or a public servant acting officially, the very first thing the magistrate must do upon receipt of a complaint under s 133(i), and that of course includes a complaint under s 132 which provides specially for offences of enticement of spouse in contravention of s 498 of the Penal Code, is at once to examine the complainant upon oath and reduce the substance of the examination into writing which shall be signed by the magistrate and the complainant. It is a sort of a preliminary enquiry, but care must be taken not to inquire into the case for the defence: *Teoh Chong Si v Nunn* 11 SSLR 80. Consequently, the letter written by a firm of solicitors on behalf of the person complained against in this case containing exculpatory statements was rightly disregarded by the learned magistrate, and I would add that in any case, it was also objectionable as its contents were hearsay and unsworn.
>
> A person complained against is not a party to the proceedings for he is not yet an accused person. So, he is in no position to claim a right to be

represented. However, he is entitled to attend the proceedings like any member of the public though he has no locus standi as a party (*Sheikh Chand v v Mohamed Hanif* 8 Cr LJ 20), and a magistrate may, if he a so wishes, examine or question him (*Jinilal Mandal v Chanderdeo Prosad* AIR 1941 Pat 419). But, again care must be taken not to convert the enquiry into a trial, before a trial. I am aware that there is some conflict of authority in India as to whether it is irregular to call upon the person complained against to be present at the enquiry and to question him, but I consider that exceptionally where the magistrate considers it is essential to do so, he may exercise that power, always taking care to ensure that the right of silence is not abrogated (*Manindra Nath v Anil Chandra* AIR 1953 Cal).

It follows, therefore, that merely to call the complainant to attest the complaint upon oath is not sufficient nor would it be sufficient to follow this up with an unrecorded and unsworn interview. There is no doubt that the requirements I have outlined above are mandatory, their object being to enable the magistrate to decide on the veracity of the complaint for that will depend on his decision as to whether or not a process should be issued. It goes without saying that this is a serious matter, since the indiscriminate issue of process encourages mischievous and malicious complaints, resulting in harassment to the person complained against and a waste of public time and money as far as the courts are concerned. This is why it is essential that the statutory prerequisites are rigidly and meticulously complied with. There is a wealth of Indian authority to support this proposition and they are conveniently collected in the *AIR Commentaries on the Indian Criminal Procedure Code* by Chitaley and Rao (7th ed) Vol 2, p 473 et seq, dealing with s 200 of the Indian Code which is in pari materia with our s 132.

Since if he has doubts, he can either inquire into the case himself or direct some police officer to make inquiries for the purpose of ascertaining the truth or falsehood of the complaint and report to him the result of such inquiries, it is apparent from ss 128 and 133–136 that the actions of the magistrate at this stage is investigatory or preliminary in nature. His position is no different from that of a police office receiving a complaint or a report of an offence and having to decide whether it refers to a non-seizable offence and to be proceeded under s 108(i) of the CPC, or whether there are reasonable grounds to proceed to suspect that a seizable offence has been committed. It cannot be said that the act of complaint or reporting, or acting upon the complaint or report to investigate or to issue summons to the accused to appear before him or another magistrate, is the institution of proceedings for an offence. The sections refer to the magistrate, not the magistrates court. This distinction becomes clear in s 173 of the CPC since only the magistrate's court conducts trials.

The language of art 145(3) on the other hand refers to any proceedings for an offence other than *before a Syariah Court, a Native Court or a Court-Martial.* It is proper to conclude that the Constitution intends that 'proceedings for an offence' refers to a proceeding for an offence as instituted when a charge is framed, read and a plea is taken in a court rather than before a magistrate not sitting in court. Clearly, art 145(3) has no application to ss 133–136 of the CPC. That disposes of the first question.

A It would be inappropriate to specifically deal with the issue of whether institution of proceedings under s 173 is contrary to art 145(3), since that question is not referred to this court. The answer may nevertheless be gleaned from the following, with regard to the question of conduct of prosecutions in relation to the second question referred to this court.

B *The second question*

The second question refers to s 380 of the CPC which is as follows:

> Prosecutions in summary non-seizable cases
>
> Notwithstanding anything in this Chapter contained:
>
> C (i) any public officer may prosecute in any court, in any case or class of cases in which he is by any written law authorised to prosecute in such court;
>
> (ii) in summary non-seizable cases in the court of magistrate —
>
> (a) the public prosecutor or a deputy public prosecutor or a police officer may appear and conduct any prosecution;
>
> D (b) any officer of any Government department or to any local authority or statutory authority, or any person employed by any local authority or statutory authority may appear and conduct any prosecution for an offence against any written law which it is the duty of the said department or authority specially to enforce;
>
> (c) any private person may appear in person or by advocate, or in the
>
> E State of Terengganu, by a pleader, and prosecute for an offence against his own person or property.

The issue that is raised is whether in giving power to a person other than the Attorney General to conduct prosecutions in private prosecutions, s 380(ii)(c) of the CPC is inconsistent with art 145(3). In urging upon the
F court that it is, Mr Cyrus Dass relied upon *Repco Holdings Bhd v PP* [1997] 3 MLJ 681.

Article 145(3) has been interpreted in *Repco Holdings Bhd v PP* as giving the Attorney General the sole authority to institute and to conduct any proceedings for an offence, and therefore any provision contained in any
G law after Merdeka Day that confers powers upon any other person offends against art 145(3). Further therefore, by virtue of art 4, such provision is void to the extent of the inconsistency. *Repco Holdings Bhd v PP* dealt with s 126 of the Securities Industry Act 1983, and s 39 of the Securities Commission Act 1993. It was followed in a number of cases such as *Kyohei Hosoi v PP* [1998] 1 CLJ 1063, *PP v Pengurus, MBf Building Services Sdn*
H *Bhd* [1998] 1 CLJ 678, *Quek Gin Hong v PP* [1998] 4 MLJ 161, *PP v Lee Ming & Anor* [1999] 1 CLJ 379, *PP v Jamil bin Jilap* [2000] 5 MLJ 311. Interestingly, reservations were expressed on the correctness of *Repco Holdings Bhd v PP* in *PP v Lee Ming & Anor* although the learned judge decided to follow it in any case. I had the occasion to express similar reservations in *Rajendran a/l Gurusamy v PP* KL Criminal Revision No 43–
I 2–2000 (unreported). In *PP v Bata (M) Bhd* [2000] 3 CLJ 433, the High Court in Shah Alam distinguished *Repco Holdings Bhd v PP* on the basis that it dealt with a non-seizable offence.

In *Rajendran a/l Gurusamy v PP*, I had the occasion to observe: A

> *Repco Holdings Bhd v PP* introduced the notion that art 145(3) gives sole or exclusive authority to the Attorney General. Nothing in the previous authorities such as *Long bin Samat & Ors v PP* [1974] 2 MLJ 152 (FC), *Johnson Tan Han Seng v Public Prosecutor* [1977] 2 MLJ 66 (FC), suggested this. In my view there is a gulf of difference between (a) sole or exclusive authority over institution, conduct and discontinuance over all proceedings and prosecutions for offences, and (b) having a wide discretion and being completely independent as to his actions to institute, conduct or discontinue prosecutions and proceedings, including those originally instituted or conducted, until his intervention, by others. B

The Attorney General acts in his own discretion whether to institute, conduct and/or discontinue prosecutions and proceedings for any offence. In the exercise of that power, the Attorney General is independent and is not subject to review by any authority. Not even by the courts (see *Long bin Samat & Ors v PP* [1974] 2 MLJ 152 at p 158C (FC)). Article 145(3) does not reserve to the Attorney General exclusively the power to institute or to conduct proceedings for offences. It follows that provisions that allow other persons to institute or conduct such proceedings are not necessarily inconsistent with art 145(3). Article 145(3) bestows upon the Attorney General an overriding authority, and he could stop any private prosecution by entering a nolle prosequi, or to take it over at any time. Section 380(ii)(c) is therefore not repugnant to art 145(3). C D E

It is true that the Attorney General may not know of a case being instituted, such that he is not in a position to decide whether or not to interfere under his overriding authority. This is particularly so in the case of a private prosecution. But that is a separate issue unrelated to the question whether the provision is inconsistent or not, which is the test under art 162.

Articles 162(6) and 162(7) in respect of pre-Merdeka laws in any case require an approach that differs from art 4 in respect of post-Merdeka laws. In the case of the latter, a law that is inconsistent with the Constitution is to the extent of such inconsistency, void. In the case of the former, the court may apply the pre-Merdeka law with such modifications, which term includes amendment, adaptation and repeal as may be necessary to bring that provision of the pre-Merdeka law into accord with the Constitution. The question remains whether there is any inconsistency as to require amendment, adaptation and repeal, which has been dealt with above. There is no power under art 162(6) to declare that s 380(ii)(c) of the CPC, a pre-Merdeka law, to be void on the grounds of ultra vires as is being sought in this question. F G H

The second question must be answered therefore in the negative.

The fourth question

The fourth question referred to this court is whether ss 133–136 of the CPC, in placing an executive function upon the magistrate, breaches art 39 and art 121(1) of the Constitution which assigns executive powers to the executive and judicial powers to the judiciary respectively. I

Mr Cyrus Dass cited *PP v Dato Yap Peng* [1987] 2 MLJ 311 (SC), a decision upon art 121 immediately before it was amended, for the proposition that power to institute and to conduct criminal proceedings is an executive power (at p 315G). It is immediately apparent if the argument is that in private prosecutions the magistrate is exercising a power to institute criminal proceedings, it is wholly misconceived. In a private prosecution it is the complainant who institutes the proceedings. The actions of the magistrate under ss 133–136 of the CPC are purely quasi-judicial procedural steps.

Even if I am wrong in this conclusion, it would appear that arts 39 and 121 neither bars persons, as distinct from courts, other than the executive from exercising executive functions, nor is judicial authority vested and reserved in the courts to the exclusion of all else.

Article 39 of the Constitution provides:

> Executive authority of the Federation
>
> The executive authority of the Federation shall be vested in the Yang di-Pertuan Agong and exercisable, subject to the provisions of any federal law and of the Second Schedule, by him or by the Cabinet or any minister authorised by the Cabinet, but Parliament may by law confer executive functions on other persons.

Clearly executive powers may be conferred by law upon other persons not in the executive branch of government. In other words the Constitution does not envisage that the executive has sole or exclusive claim upon executive powers.

Article 121 provides:

> (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely —
>
> (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and
>
> (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;
>
> (c) (Repealed),
>
> and such inferior courts as may be provided by Federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under Federal law.

Whilst it is true that the original art 121 provides that the judicial power of the Federation is vested in a Supreme Court and such inferior courts as may be provided by federal law, the article has been amended effective 10 June 1988 by s 8 of Act A704. In the present language of art 121, the jurisdiction and powers of the High Court and the inferior courts are such as may be conferred by or under federal law. The basis of the submission by Mr Cyrus Dass therefore no longer exists in art 121. Although Gopal Sri Ram JCA, in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah* [1998] 3 MLJ 289 (CA) did say at p 307I:

> ... In saying this, we do not overlook the amendment to art 121(1) of the Federal Constitution whereby the words 'judicial power of the Federation' were deleted on 10 June 1988 by Act A704. However, in accordance with well-established principles of constitutional interpretation, the deletion does not have the effect of taking away the judicial power from the High Courts ... .

I am certain that the learned judge did not intend the meaning of the sentence as it reads at first glance, ie that the amendment did not have any effect at all. If the judicial power is derived from art 121, the amendment cannot fail to have the effect of removing from the article the basis of the judicial power, and to move it to be found from Federal law, instead of from the Constitution. What the learned judge sought to say, in context, is that the principle of judicial power being vested in the judiciary is so held in other jurisdictions where the constitution themselves did not so state.

Be that as it may, art 121 as presently found, clearly says that the courts shall have such jurisdiction and powers as may be conferred under Federal law. At the same time art 121 was amended, art 145(3A) was introduced, being the foundation for laws such as s 418A of the CPC. Interesting as the point may be for debate, one must not lose sight of the fact the powers conferred upon the magistrate are powers conferred upon him as an official, and not upon the magistrate's court as such. The powers of inquiry, in the same way as powers of remand etc as cited, are not strictly executive powers, and are best described as quasi-judicial. In my view there is nothing contradictory in these quasi-judicial functions, as necessary adjunctive functions to the judicial process, being visited upon magistrates.

Furthermore, the question is that ss 133–136 are void and invalid ('adalah tak sah dan terbatal') upon the grounds the sections are ultra vires art 39 and art 121(1). As explained above, since the CPC is a pre-Merdeka law, ss 133–136 cannot be declared void. Art 162(6) requires the court to apply the law with such modifications as is necessary to bring it into accord with the Constitution. As is clear from the foregoing I do not find that ss 133–136 to be inconsistent with art 39 or art 121(1).

The fifth question

The fifth question seeks an answer as to whether ss 133–136 which contains provisions to commence proceedings without: (a) investigation; and/or (b) without the attendance of the accused to be heard before such commencement, is invalid and void as being contrary to art 5 and art 8 of the Constitution:

> (v) Seksyen-seksyen 133 dan 136 Kanun Prosedur Jenayah (Cap 6) yang mengandungi peruntukan untuk permulaan prosiding-prosiding jenayah tanpa penyiasatan dan/atau tanpa defendan yang diniatkan didengar terlebih dahulu adalah tak sah dan terbatal kerana ianya melanggar proses undang-undang yang dijaminkan oleh Perkara 5 dan 8 Perlembagaan Persekutuan.

Since the CPC is a pre-Merdeka law, art 4 does not come into operation to strike down a law as being void upon the grounds of being inconsistent with the Constitution. The applicable provision is art 162(6) which requires the

court to make modifications to the law to make it in accord with the Constitution. Thus, ss 133–136 cannot be declared to be null and void. The question must therefore be answered in the negative.

Article 5 provides as follows:

PART II
FUNDAMENTAL LIBERTIES

Liberty of the person

(1) No person shall be deprived of his life or personal liberty save in accordance with law.

Article 8 provides as follows:

Equality

(1) All persons are equal before the law and entitled to the equal protection of the law.

It was argued that the procedure under ss 133–136 does not require any investigation by the police, and the magistrate institutes the proceedings on the mere complaint of a complainant he has examined on oath. The magistrate is not obliged to examine the person complained against before instituting proceedings (see *Re Rasiah Munusamy*). It was urged that prior police investigation is a safeguard, and submitted that, as in *Assa Singh v Menteri Besar, Johore* [1969] 2 MLJ 30 (FC), the safeguards of art 5 must be read into ss 133–136, such that a person alleged to have committed an offence is no more exposed under a private prosecution than under a public prosecution. Relying on *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 (CA), and *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289 (CA), it was submitted that procedural fairness requires prior investigation by the police and statements recorded from witnesses.

The short answer under art 5(1) is that the procedure set out in ss 133–136 is contained in law. Thus issue of process upon the applicant is in accordance with law. The equally short answer under art 8 is that all complaints of a non-seizable offence being committed by a person is proceeded with under ss 133–136. Thus, all persons alleged to have committed a non-seizable offence are equal and are equally protected.

Section 133 requires that if the magistrate takes cognisance of the complaint, he must examine the complainant on oath. It is well to remember that the complaint is the allegation that some person has committed a non-seizable offence. The substance of the examination on oath, which shall be reduced to writing and signed by the complainant and also by the magistrate, is a record of a sworn statement by the complainant. If the magistrate sees reason to doubt the truth of the complaint, he may examine the complainant on oath under s 134 and record his reasons for doubting the truth of the complaint, and may decide to postpone the issue of process for compelling attendance by the accused, and to inquire into the complaint himself or direct a police officer to make inquiries for ascertaining the truth or falsehood of the complaint, and report to him the result. The

magistrate may dismiss the complaint if after examining the complainant, and the result of the inquiry if any, if in his judgment there were no sufficient grounds for proceeding (s 135). Only if he is satisfied there are sufficient grounds for proceeding is he authorized to proceed under s 136 with issue of a summons or a warrant, as the case may be. There is adequate safeguard in that if the police does not think an offence was committed, the report is referred to the magistrate. And if the magistrate errs, the matter may be brought up on appeal or revision.

The remaining question is whether there ought to be a difference between a seizable and a non-seizable offence. A clear line has been drawn in the Code between seizable and non-seizable offences, and all persons are equally subject to it. A large percentage of offences under the Penal Code are non-seizable (see First Schedule to the Code). The summary procedure of non-seizable cases enable an early assessment by the magistrate of the credibility of the complaint, to bring the accused person before the court as early as possible, by personal appearance or by advocate as the case may be, so that a plea is taken. If he pleads guilty, the case could be disposed of quickly. If the accused claims trial (see s 137), then a date is set down for trial under s 173.

Under s 108(ii), the special powers of investigations may only be exercised in respect of non-seizable offences, by the police pursuant to an order by the Public Prosecutor. The Public Prosecutor may, also in his discretion, by warrant require a magistrate to take cognisance of a non-seizable offence under s 128(c), or choose to intervene, take over, or enter a nolle prosequi under art 145(3) in respect of any non-seizable offence before the court. Prior to the amendments to ss 133, 134, 135 providing for notice to and intervention by the Public Prosecutor, the practical effect of art 145(3) as a concurrent but overriding provision as explained earlier above, is that a private prosecution may be instituted, and proceeded with by a private prosecutor until the Public Prosecutor elects to intervene, except for those offences for which the Code provides that a sanction by the Public Prosecutor must be obtained (see s 129). The offence in this case is not one of those offences for which the sanction of the Public Prosecutor is required.

Revision under s 35 of the Courts of Judicature Act 1964

In reviewing the issues in this case it has come to the attention of this court that the operative part of the examination is as follows:

> Semasa meninggalkan dewan tersebut jam lebih kurang 10.50 pagi, Dato' Samy Velu keluar dan menerpa saya dan cuba memukul saya tetapi telah dihalang oleh beberapa orang. Saya berada dalam keadaan terperanjat dan ketakutan.

Based upon this, the learned magistrate proceeded to frame a charge as follows:

> Bahawa kamu pada 10 Mei 1996 jam lebih kurang 10.50 pagi di luar Mahkota Ballroom, Hotel Istana dalam Wilayah Persekutuan Kuala Lumpur telah menyerang seorang S Nadarajah dengan niat untuk memukul beliau tanpa

A sebarang provokasi daripada S Nadarajah dan dengan itu kamu telah melakukan satu kesalahan di bawah s 352 Kanun Keseksaan dan boleh dihukum di bawah seksyen yang sama.

In *Re Rasiah Munusamy*, Edgar Joseph Jr (as he then was) quashed the order issuing a warrant. The following extract from the judgment shows that the B magistrate must approach the complaint, the examination and his consideration thereafter under ss 133–136 with an inquiring mind, and not one of mere passive acceptance without question (at pp 295–296):

> The record provided also showed clearly that there was not even a semblance of compliance with the requirements to which I have already adverted. I accordingly did not have the slightest hesitation in concluding that the order C by the learned magistrate directing the issue of a warrant of arrest in this case was made without jurisdiction and is therefore void.
>
> There were further grounds for impugning the order of the learned magistrate and the warrant pursuant to which it was issued.
>
> The complaint and the report do not contain admissible evidence of a D taking with intent that the wife may have illicit intercourse with any person, an essential ingredient of the offence under s 498 of the Penal Code. The complaint, shorn of introductory and formal parts, was given in just over five lines and reads as follows:
>
> > 'I believe he has concealed and detained her in a hotel in Penang and they are expected to stay in Penang for three days. I believe my wife has E already committed adultery with him.'
>
> The allegations in the report which read:
>
> > 'I believe he has concealed and detained her in a hotel in Penang and they are expected to stay in Penang for three days'. 'I believe my wife has already committed adultery with him'.
>
> F made it clear that the complainant had no personal knowledge of these essential averments which were worthless as evidence being plainly hearsay. There is not even a disclosure of the grounds for such belief. Once these flaws are recognized as being of primary importance the entire complaint loses its sting.
>
> The remaining defects in the complaint may be dealt with shortly. The G marriage certificate, although specifically referred to in the complaint with its number and date quoted, does not appear to have been produced for inspection by the magistrate. Nor is it anywhere alleged that the person complained against knew or had reason to believe that the lady concerned was the complainant's wife. These are also essential elements of an offence under s 498 of the Penal Code, and in the absence of such evidence I again fail to see how it could be said that a prima facie case had been established.

H

Returning to the case at hand, it is unclear how from 'semasa meninggalkan dewan tersebut', the magistrate arrived at the charge 'di luar'. It is unexplained. The accused also was supposed to have 'menerpa saya dan cuba memukul saya tetapi telah dihalang oleh beberapa orang. Saya berada dalam keadaan terperanjat dan ketakutan.' In the charge, this progressed to I 'telah menyerang seorang S Nadarajah dengan niat untuk memukul beliau tanpa sebarang provokasi daripada S Nadarajah' without any explanation on the record. The examination on oath is the basis upon which a charge is

framed, and not the complaint, which as explained earlier above is simply the allegation.

The question a magistrate must address himself to in considering whether to act under s 136 is whether in his opinion there is sufficient grounds for proceeding. Such opinion must be based on reasonable grounds, bearing in mind that the result of holding there is sufficient ground, is the issue of a summons or a warrant compelling the attendance of the person complained against. While it is trite that he should not be concerned with the defences that such person might raise, it is equally trite that he must be satisfied that there is a prima facie case for the charge framed. In other words, he must pay particular attention to the elements of the offence, that is, the subject of the charge as framed, and be satisfied that those elements exist. If he does not, that error is as likely to result in a person who ought to be charged ending up with an acquittal, as it is likely to result in charging when a charge is unwarranted.

The charge the magistrate has framed is in respect of an offence of assault under s 352 of the Penal Code. Assault is defined in s 351 of the Penal Code:

> Assault
>
> Whoever makes any gesture or any preparation, intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.
>
> *Explanation* — Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault.
>
> ILLUSTRATIONS
>
> (a) A shakes his fist at Z , intending or knowing it to be likely that he may thereby cause Z to believe that A is about to strike Z. A has committed an assault.
>
> (b) A begins to unloosen the muzzle of a ferocious dog, intending or knowing it to be likely that he may thereby cause Z to believe that he is about to cause the dog to attack Z. A has committed an assault upon Z.
>
> (c) A takes up a stick, saying to Z, 'I will give you a beating.' Here, though the words used by A could in no case amount to an assault, and though the mere gesture, unaccompanied by any other circumstances might not amount to an assault, the gesture explained by the words may amount to an assault.

The offence is, however, constituted not by the assault itself. In a sense, there is a considerable difference between the popular sense of the term assault, and the sense that it is used in the Penal Code, where the offence is constituted when the assault is otherwise than on grave and sudden provocation by that person. Section 352 of the Penal Code provides:

> Punishment for using criminal force otherwise than on grave provocation
>
> Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person, shall be punished with

A imprisonment for a term which may extend to three months, or with fine which may extend to one thousand ringgit, or with both.

Explanation—Grave and sudden provocation will not mitigate the punishment for an offence under this section, if the provocation is sought or voluntarily provoked by the offender as an excuse for the offence; or

B If the provocation is given by anything done in obedience to the law or by a public servant in the lawful exercise of the powers of such public servant; or if the provocation is given by anything done in the lawful exercise of the right of private defence.

Whether the provocation was grave and sudden enough to mitigate the offence, is a question of fact.

C The term 'otherwise than on grave and sudden provocation given by that person' in s 352 requires the complaint, and the results of the examination on oath by the magistrate must include a positive assertion that there was no grave and sudden provocation from him. In this case, the examination showed that the complainant had participated in a debate with the person D accused, where ire of the latter was raised to the extent where the complainant had moved a point of order for the chairman to order the latter to behave himself. These facts ought to put the magistrate on notice to inquire and satisfy himself that there was no grave and sudden provocation at the point of leaving the Mahkota Ballroom when the alleged incident is supposed to have occurred. The notes of the examination on oath does not E disclose that he had made that inquiry.

Furthermore, the examination itself disclosed that the accused 'telah cuba menyerang saya tetapi bila melihat kakitangan akhbar berada di situ beliau menghentikan tindakan'. He had stopped voluntarily because of the presence of other people. Now, there is nothing to say there were no other F people while leaving the Mahkota Ballroom such that the accused would have no hesitation to carry out an assault or use criminal force upon the complainant. Indeed the examination on oath disclosed that there were other people there. While the allegation 'menerpa saya', (lunged at the complainant) is obviously an observable fact, the allegation 'cuba memukul saya' is more difficult. While it could be an observable fact, it could also be G a conclusion or an opinion of the complainant. It was important to find out if the alleged 'cuba memukul saya' occurred before or after he was restrained. The use of the word 'cuba' is significant as it implies in the circumstances that the accused was under restraint. The question whether a certain act amounts to an assault depends upon the reasonable H apprehension which a person entertains about criminal force being imminent (see *The Penal Law of India* (10th Ed) Vol 3 p 2991 by Dr Sir Hari Singh Gour). If there was no present ability to use criminal force, for example he was being restrained, or that the circumstances were such that the use of criminal force was unlikely or impossible, there cannot be a reasonable apprehension that criminal force was imminent.

I In all of the circumstances, there was insufficient material before him to issue the summons. He ought to have acted under s 134 of the CPC and ordered a police officer to investigate and to report back to him before

making a decision whether or not to issue a summons. Considering that the issue of a summons or warrant results in the restriction of the liberty of a person in that he must appear at the time and place stated, these are not powers to be lightly exercised. He ought not to have acted prematurely. It was wrong for the magistrate to have framed the charge and to have issued the summons. I would therefore exercise the powers under s 35 of the Courts of Judicature Act 1964 and order the summons to be quashed.

Order accordingly.

Reported by Jafisah Jaafar